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Docket: 433-11US

US.Pat.Apl.Nr 10/759,164

Remarks
submitted September 2006

[001] This is in response to the Office Action dated 01 June 2006.

[002] Amendments

Please enter the amendments to claims 1 and 10, as in the enclosure. The amendments clear up a minor inconsistency.

[003] Rejection of claim 1 under 35.U.S.C.103

The PTO position regarding the '103 rejection of claim 1, as we understand it, is as follows.

1. Consider the following modification to the old Giordano apparatus:-
 - (a) Discard the pull-out drawers 4 of the Giordano apparatus, whereby Giordano is now left with just the open frame 6 (which is shown in Fig 5).
 - (b) In place of the pull-out drawers, insert floor, roof, side, back, panels in each compartment in the frame, to form rows and columns of completely-enclosed poultry containers, and use hinged door panels to close off the fronts of each compartment.
2. That new apparatus, being a modified version of the old Giordano apparatus, falls within the scope of claim 1.
3. The skilled designer of poultry transport cages would find it obvious to make the above modification to the old Giordano apparatus, because:-
 - (a) The designer would obviously recognise the problem in the old Giordano apparatus that birds, or parts of birds, can escape or protrude upwards from an open-topped drawer.
 - (b) The designer would obviously realise that the way to solve that problem is to provide enclosed compartments built into the frame, each with a hinged front door panel.
4. The obviousness of the modification follows the teachings of Sheaffer, in that:-
 - (a) Sheaffer shows an apparatus having a completely-enclosed compartment with a hinged front door panel, being the plenum chamber shown in Fig 15 of Sheaffer.
 - (b) It would obviously occur to the designer, therefore, to discard the pull-out drawers in Giordano's old apparatus, for containing the separate trays of poultry within the cage, and substitute a completely-enclosed compartment with a hinged-down front door panel.

We do not accept that the above PTO position justifies the rejection of claim 1, for the following

reasons.

[004] Under item 2 of section [003] above, the PTO position is that the modified apparatus falls within the scope of claim 1. However, claim 1 calls for:

- [15] at least one of the panels of the tray-chamber is of open lattice form, having openings of such large size and configuration that the tray-chamber can be characterised as light and well-ventilated, the openings being also of such small size and configuration as substantially to prevent the protrusion of body parts of the birds outside the tray-chamber;
- [16] the floor of the tray includes a panel of plastic, and extends from the front to the rear, and from the left side to the right side, of the tray-chamber;
- [17] the panel of plastic has either no perforations, or, if having perforations, the perforations are so small that the foot of a poultry bird cannot enter therein;
- [18] the panel of plastic is of such form and robustness, and is so mounted in the support-framework, that, with several poultry birds contained in the tray-chamber, liquid entering the tray-chamber substantially cannot form pools, over substantially any portion of the upper surface of the floor panel with which the birds can come into contact.

We do not accept that the slits in the floor panel of Giordano's drawers are so small that the birds cannot put their feet through. Also, we do not accept that floor panel of Giordano's drawers is of such form and robustness as to prevent pooling. The PTO has not explained how/why it feels able to ignore these features of claim 1.

However, these points probably have little force, because the PTO tells us to discard Giordano's pull-out drawers, and to substitute Sheaffer's Fig 15 containers. Now, Sheaffer's containers are sealed, and therefore do not qualify as of open lattice form. (We will accept that the pull-out drawers 4 of Giordano can be characterised as light and well-ventilated -- but the PTO position is that the drawers 4 are to be discarded.) Plus, Sheaffer's containers are not light and well-ventilated. Plus, Sheaffer's containers, being sealed, certainly will not prevent pooling. (Incidentally, we note that the Fig 15 container, in Sheaffer, being a ventilation plenum 228, is not the container or compartment in which the animals reside. But in any case, both the animal container 20 and the Fig 15 ventilation plenum, are not light and well-ventilated, and both have no resistance to pooling.)

So, further modifications would have to be made to Giordano's apparatus, in addition to the modifications suggested by the PTO, in order for the new apparatus to fall within the scope of claim 1. The PTO does not mention why it regards these further modifications as obvious. The rejection of claim 1 therefore has not been properly supported.

[006] Again, under item 2 of section [003] above, the PTO position is that the modified apparatus falls within the scope of claim 1. However, claim 1 calls for an apparatus that includes

a plurality of separate cages, and for each cage of the plurality of cages to include a support-framework. In claim 1, the several panels are fixed into the support-framework of the cage, and define the tray-chambers of the cage.

Clearly, those features are not present in Giordano's pull-out drawers. But we point out that those features are not present in Sheaffer, either. The sides, floor, roof, etc of Sheaffer's box 20 cannot be regarded as the "panels" called for in claim 1, because in Sheaffer the box 20 clearly is not fixed to Sheaffer's support-framework 12.

So, again, further modifications would have to be made to Giordano's apparatus, in addition to the modifications suggested by the PTO, in order for the new apparatus to fall within the scope of claim 1. The PTO does not mention why it regards these further modifications as obvious. The rejection of claim 1 therefore has not been properly supported.

[007] Under item 3(a) of section [003] above, we note the PTO position that the designers would recognise that, in Giordano, the birds might extend an appendage above the top edge of the tray. We agree that the designers would indeed recognise such a problem, because that is the very problem with which Giordano et al say their patent is concerned.

[008] Under item 3(b) of section [003] above, we contest the PTO position. We note that Giordano's solution to the extended appendage problem is to arrange the trays to pull out to the left (Figs 1,2,3) as the birds are being inserted from the right. When loading the poultry, first Giordano et al partially withdraw the three upper trays to the left, allowing them to fill the lowest tray from the right (Fig 1). Then, they close the next-to-bottom tray, thereby roofing over the bottom tray. Then, they load the next-to-bottom tray (Fig 2). Then, same with the next-to-top tray (Fig 3). Then, they close the top tray, thereby roofing over the next-to-top tray. Finally, having loaded the top-tray, they place the lid 12 over the top of that. They explain this procedure in some detail in their specification.

The PTO's position is that the skilled designer of poultry transport cages would have found it obvious to abandon this carefully detailed procedure taught by Giordano, and to do away with Giordano's pull-out trays. We do not accept that this would have been obvious. First, clearly, Giordano et al DID wish to retain the pull-out drawers arrangement. (We can speculate that they wished to retain the open-topped pull-out drawers to simplify the task of unloading the poultry at the processing factory.) The innovative loading /unloading procedure taught by Giordano provides a way of enabling poultry farmers to use open-topped drawers, without incurring the problem that the birds rise from, or protrude upwards out of, such drawers, during loading and unloading.

Therefore, if the designer were to discard Giordano's pull-out drawers, that would go against the main thrust of Giordano's innovation. Giordano's invention was a procedure aimed at enabling designers to keep the open-topped drawers without incurring the problems that arise from bird

parts protruding upwards.

It is, of course, a principle of patent law that if a modification to an old machine makes the old machine WORSE in the performance of its intended purpose, such modification must be regarded as prima facie NOT obvious. If the open-topped pull-out drawers of Giordano are replaced by the airtight pull-out containers of Sheaffer, now the benefits that Giordano et al indicated they wanted to retain, i.e the benefits of open-topped drawers, have gone. The baby has been thrown out with the bathwater.

[009] Under item 4 of section [003] above, we contest the PTO position that the designers would obviously turn to Sheaffer as offering a solution to the problem of bird parts protruding out of the pull-out drawers.

We note that the compartment illustrated in Fig 15 of Sheaffer is not a compartment in which animals are housed. We also note that the hinged door 230 is not a door that has to be opened in order for animals to be inserted into, or removed from, the compartment. In Sheaffer, the door 230 opens for the purpose of permitting the cleaning out of the ventilation plenum.

There are, of course, countless prior apparatuses that show doors of various kinds, on structures that are used for purposes other than the containment of animals. The PTO has supplied no information as to why it would obviously occur to the skilled designer to single out the Sheaffer design, from all these others.

The PTO does not answer the following question: How/why would the designer hope/expect that the teachings of Sheaffer would solve Giordano's problem, i.e the problem that, in a system with open-topped pull-out drawers, sometimes the bird appendages protrude above the top edge of the open-topped drawers? In the absence of such answers, the rejection of claim 1 under '103 cannot be supported.

[0010] Regarding the rejection of claim 7, claim 7 calls for the fence panel to be a one-piece plastic moulding. Giordano's members 7,8,9 clearly cannot be regarded as a one-piece plastic moulding. Therefore, the rejection of claim 9 is not properly based.

[0011] Regarding the rejection of claim 17, as we understand the old Sheaffer apparatus, the animals are not kept in the chamber 228. Thus, there is no reason why the skilled designer would find it obvious to go to Sheaffer in the hope or expectation that Sheaffer would offer any solution to the problems faced by the designer seeking to improve the Giordano apparatus.

[0012] Re the rejection of claim 2, based on Olson. We note that the floor 16 of the old Olson

apparatus consists of WIRES (line 20 of col 2 of Olson). It is true that liquids will not pool on Olson's floor, but the skilled designer would certainly not attribute Olson's resistance to pooling as being due to the fact that the floor is domed, but to the fact that the floor is made from parallel wires.

We note the PTO position that the Eskimo Pie case requires that a change to the physical form of an old apparatus must be regarded as obvious if, as a result of the change to the form, just one aspect of the function of the old apparatus remains unchanged. But of course, the law is that if the change of physical form leads to a change in just one aspect of the function or performance of the apparatus, that is enough to negate the presumption of obviousness enunciated by Eskimo Pie. Only if the change to the physical form of the apparatus **MAKES NO DIFFERENCE AT ALL** to the function of the apparatus, is the Eskimo Pie presumption of the obviousness of the change to be invoked.

Thus, in this case, if doming the floor had no function at all, as compared with a flat floor, the Eskimo Pie case might be relevant. But doming the floor **DOES** have a function. In a case where a floor panel is of such a physical structure that the panel can/might retain liquids, and thus can/might be subject to the pooling problem, the applicant has recognised that doming the floor panel (within the dimensional parameters recited in claim 2) will perform the highly advantageous function of preventing (or at least of resisting) pooling. Thus the Eskimo Pie presumption of obviousness is negated.

Clearly, the function of preventing pooling cannot be attributed to the doming taught by Olson, because Olson's floor is made of parallel wires. And no other prior art has been tabled which indicates that others have already thought of doming as an answer to the pooling problem. Without that, the rejection of claim 2 cannot be sustained.

[0013] Regarding the allowable subject matter, we note that claims 8,10,11-16 are indicated as (conditionally) allowable. However, we feel we are entitled to the broader scope of protection, for the above reasons.

Submitted by:



Anthony Asquith
Regn 32373

Agent for the Applicant

Enclo: claim amendments (5 pages)